UNITED STATES OF AMERICA	)	
	)	**DEFENSE RESPONSE TO PROSECUTION MOTION TO EXCLUDE ALL EXPERT WITNESSES**
v.	)	
DAVID M. HICKS	)	
	)	**19 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves the military commission to permit the testimony of expert witnesses before the military commission, and states in support of this motion:

1. **Synopsis**: The defense has requested the government produce expert witnesses to provide testimony in support of defense motions before the military commission. These experts will testify on various areas of international law relevant to Mr. Hicks' case. The prosecution has refused to produce these witnesses,[1] based on the common argument that expert witnesses should not be permitted to testify at the motion hearing. The prosecution's attempt to bar expert testimony is not supported by international or domestic law.

2. **Facts**: The defense has filed 16 motions with the commission. The defense has requested to present testimony of 5 expert witnesses in various areas of international law in support of these motions. The prosecution has refused to produce these witnesses based on one common argument that legal expert witnesses should not be permitted to testify before the commission. The prosecution argument is not based on the qualifications or relevance of the requested witnesses' testimony.[2] The commission is made up of one officer who is a lawyer by training, and 4 military officers with no formal legal training.[3]

3. **Discussion**:

A. Defense Access to Witnesses

Under Military Commission Order No. 1 (MCO 1), section 5H, "[t]he accused may obtain witnesses . . . and documents for the accused's defense, to the extent necessary and reasonably available as determined the Presiding Officer." MCO 1 section D(2)(a) regarding production of witnesses states:

> The Prosecution or the Defense may request that the Commission hear the testimony of **any person,** such testimony **shall be received** if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative.

[1] The prosecution submitted "Prosecution Response to Defense Witness Requests of 8 October 18, 2004 and Motion to Exclude Attorney and Legal Commentator Opinion Testimony of 13 October 2004, in which the prosecution seeks to exclude the testimony of any expert witness.

[2] The prosecution claims the synopsis contained in the defense's request are inadequate as well. As the Presiding Office has yet tot rule on the witness requests, it would be premature to address this issue.

[3] The number of members is yet to be decided, this motion is written still pending the Appointing Authority's decision on member challenges. The alternate member is also a military officer who is not a lawyer.

To be admissible, testimony must have probative value to a reasonable person.[4] Following these provisions, the commission should permit the testimony of expert witnesses and grant the defense's request for five (5) expert witnesses to testify on various aspects of International law in support of the defense's motions.

The defense has requested the production of several experts on aspects of international law, including the law of war, to testify in support of defense motions pending before the commission. These witnesses are widely respected scholars who have published articles, and in some cases seminal textbooks, on issues relevant to defense motions. The prosecution does not base their exclusion of expert witnesses base on any claim of lack of qualification. The synopses of these experts' testimony defense provided to the government (and subsequently to the commission) is more than sufficient to show the testimony of these experts would have probative value to a reasonable person on the legal issues the commission must decide to rule on the defense's motions.

The testimony of these experts would not be cumulative. In its motions, the defense has provided arguments based on sources of law that support the defense positions stated in their motions. These arguments are not evidence. They are statements of one party's attorneys regarding an outcome for the case that party desires. Accordingly, to date, no evidence has been presented in support of the defense motions.

The testimony of the requested experts, on the other hand, would be evidence. The requested experts are not advocates for any party in this case. They are independent scholars whose legal training and expertise gives them the ability to examine a particular situation and comment and explain how the law applies. Here expert testimony on the law applicable to the defense motions is critical to the commission to effectively determine the proper ruling on each motion. The commission is not only the finder of fact in this case; it is the finder of law. This is a unique position for the all but one of the member of the commission.

In a court-martial with members, the panel is always the finder of fact. However, the panel is never the finder of law. The UCMJ provides the panel with a military judge to act as the finder of law. It is the military judge, without any input from the panel, who determines what law applies in the case. The military judge is, of course, a lawyer, usually with extensive experience and training on the legal issues involved in a court-martial. The panel members take the military judge's instructions on the law and apply the facts they find to it to determine guilt or innocence.

In this commission, however, there is no judge. The presiding officer, while he has legal training, is not the source of law for the panel. The panel may and should look to the presentations of the parties for input on the legal principles, concepts, and standards they should apply to the facts in this case.

Except for the presiding officer, none of the panel members has any formal legal training. None of the commission members is an expert in international law. To decide the defense motions, the commission must make determinations and make rulings on complicated issues of

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[4] MCO 1 D(1).

international law. The commission, while it has the power to do so on its own initiative, has not summoned any expert witnesses to testify before the commission. Therefore, for the panel to make an informed decision on the legal issues presented in the defense motions, the parties must present evidence of the law to the panel as part of their presentations in support of or in opposition to the parties' motions. As stated above, the arguments the parties state in their written motions are not evidence. The testimony of expert witness, called by either side, is therefore admissible, and not cumulative. Moreover, it will assist the panel in determining important issues in this case. Accordingly, under MCO D(2)(a) it must be admitted.

B. Response to Prosecution Arguments

(1) Live Expert Legal Testimony is Superior to Written Expert Briefs

In the prosecution's document dated 13 October 2004, entitled, "Motion to Exclude Attorney and Legal Commentator Opinion Testimony," it readily admits the necessity of evidence from "legal scholars and commentators." However, the prosecution seeks to limit the presentation of such evidence to written materials only. In its motion the prosecution states, "when **unique or significant issues of law** are before a court, **as undeniably exist in this case**, both U.S. and International courts have recognized the benefit of receiving **written material** from legal scholars and commentators." (See Prosecution Motion, page 4, emphasis added)

Presenting expert legal opinion evidence in written form only would impair the defense's ability to fully present its case, and limit the ability of the commission to fully explore these issues. A written brief is not a substitute for live testimony. Live testimony allows the attorney to present the evidence in a more accessible fashion. Moreover, without live testimony, the commission will be unable to question the witnesses. The issues involved in the defense motions are complex, and some have never been litigated before. Allowing the commission to ask questions of these expert witnesses will be critical to ensure that the commission, as finder of law, fully understands the issues involved. Finally, having the experts testify live allows the opposing party to cross examine the witness, and allows the commission to observe the witnesses' demeanor, both of which are important to the commission in properly weighing the evidence.

(2) Cases Cited by the Prosecution are Inapplicable to U.S. v. Hicks

(a) *Specht v. Jensen*[5]

The *Specht* case involved an interpretation of the Federal Rules of Evidence (Federal Rules) in which the 10th Circuit disallowed testimony by an expert witness on a legal issue. The prosecution cites this case for the proposition that legal expert testimony would supplant the role of the judge, and requires a lengthy "battle of the experts." In citing *Specht* it would appear the prosecution is trying to "have its cake and eat it too." The President's military order establishes that the Federal Rules do not apply to this commission. Additionally, this commission is not structured with a separate judge and jury removing the concern of an expert witness interfering with the judge's role. Accordingly, the holding in *Specht*, does not apply to this, or any other military commission case. However, in *Specht*, the 10th Circuit looked to the Federal Rules of

[5] 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989).

Evidence Advisory Committees' test for when expert testimony might be necessary. The court stated:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.[6]

Applying this "common sense" test to Mr. Hicks' case, it is reasonable and prudent to have the commission hear from individuals with specialized training and expertise in the area of international law so the members will be educated in this complex area.

United States district courts have historically allowed testimony by experts on international law. For example, in *Fernandez-Roque v Smith*, 622 F.Supp 887 (1980), a U.S. district court conducted an evidentiary hearing and heard expert testimony on the then current state of international law from two professors from Columbia University[7] and Vanderbilt University.[8] In its opinion, the court stated "expert testimony is an acceptable method of determining international law."[9] Expert testimony relating to the state of international law was also received in a number of other district court cases, including *Navios Corporation v. The Ulysses II,*[10] *United States v. Maine*,[11] and *Texas v. Louisiana*.[12]

Following the precedent set by the U.S. federal courts, the commission should allow expert testimony on legal issues even if it meant having both sides present expert testimony on a particular issue. The commission panel can only benefit by hearing expert testimony and questioning experts from both sides as to what law the commission should apply.

(b) *United States v. Ramzi Ahmed Yousef*[13]

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[6] Id at 807.

[7] Professor Louis Henkin was co-director of the Columbia University Center for the Study of Human Rights. He also served as chief reporter for the American Law Institutute's *Restatement of the Foreign Relations Law of the United States (Revised)* and as president of the United States Institute of Human Rights. He had also authored several books and articles in the field of international law, and was considered an authority in that field.

[8] Professor Harold G. Maier was Director of the Transnational Legal Studies Program at Vanderbilt University. He had served as a consultant and counsellor on international law t the U.S. State Department, and had testified before Congressional committees concerning immigration and other international issues. He was the author of numerous works in the field of international law.

[9] *Roque v Smith*, 622 F.Supp 887 (1980).

[10] 161 F.Supp 932 (D.Md.1958) (testimony on the state of war in hostilities between Egypt and the United Kingdom and France in 1956).

[11] 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed. 2d 363 (1975), Transcript of the Hearing before the Special Master 473, 1899 (1971) (testimony on the law of the continental shelf and other law of the sea issues).

[12] 426 U.S. 465, 96 S.Ct. 2155, 48 L.Ed.2d 775 (1976), Transcript of the Hearing before the Special Master 939-1906 (1975) (testimony concerning the continental shelf boundary).

[13] 327 F.3d 56 (2nd Cir 2003)

The prosecution cites the *Yousef* case in which the appellate court warned lower courts not to rely solely on written material from academics as sources of international law. The court did not, however, ban the use of expert testimony. The court explained that "misplaced reliance on a **treatise** as a primary source of the customary international law . . . "[14] led the lower court astray. In *Yousef* , the lower court had adopted the statements of the Restatement (Third) as evidence of the customs, practices, or laws of the United States and/or evidence of customary International law".[15] The court pointed out that to determine customary international law, one must "look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States."[16]

In this case, however, as the defense has argued extensively in its briefs, the charges against Mr. Hicks, and indeed the very establishment of this commission itself are creations of the executive branch. Many of them have no basis in Congressional legislation. Most of the legal issues presented in this case are issues of first impression. The defense submits that expert testimony and input to the commission regarding critical issues of law is an absolute necessity, rather than an imposition as is suggested by the prosecution.

(c) *Kordic and Cerkez*[17]

The prosecution in its attempt to find support in international courts fails to fully disclose in its motion the use of the expert witness in *Kordic and Cerkez*. The prosecution's motion implies that the International Criminal Tribunal of Yugoslavia (ICTY) disallowed expert testimony in a situation similar to that presented to this commission. This implication is wrong.

A full reading of the transcript in *Kordic and Cerkez*, reveals that the prosecution attempted to present "expert witness" testimony during the merits portion of the trial from an individual who had performed an independent investigation into the **facts** of the case being tried. The prosecution also attempted to submit this individual's report, which contained conclusions as to how the "facts" from his investigation should be applied to the relevant law. The court refused to admit this "expert's" testimony and report.[18]

As the President promulgated in his military order, the rules of evidence do not apply to this commission. Selectively employing the federal rules of evidence is the prosecution trying to have "its cake and eat it too."

[14] Id. at 99. (Prosecution motion utilizes Lexis page number of 69)

[15] Id at 100.

[16] Id at 103.

[17] IT 95-14/2

[18] Kordic and Cerkez, IT 95-14/2-T, entire transcript of January 28, 2000. See specially, J. Robinson at 13280. "I think this is what concerns us, because ultimately that is a matter which we have to decide on the basis of the facts."

In our case, the defense is offering testimony from legal experts on issues involving pre-trial legal motions, not factual issues. Thus, the prosecutions reliance on *Kordic and Cerkez* is misplaced.

More importantly, however, the ITCY has allowed expert testimony on legal issues in cases. For example, in *Mucic et al,*[19] the ITCY trial chamber heard from an expert legal opinion testimony involving a specific aspect of the Geneva Convention. In a later appeal proceeding the court ordered that the defense could present legal expert testimony on an issue regarding the Costa Rican constitution.[20] A true representation of the practice of international courts and tribunals in determining questions of law would show that expert legal testimony is readily accepted.[21] In fact, it is the Court which usually seeks such evidence from an amicus curiae, rather than waiting for the parties to present such evidence. This is currently the practice of the ICTY in the case of Slobodan Milosevic.[22]

C. Conclusion:

Under MCO 1 section 5H and section D, the expert testimony proffered by the defense is admissible. Such testimony is not cumulative with the motions and documents submitted by the defense, and will be helpful to the commission in determining critical issues of first impression on complex areas of International law relevant to Mr. Hicks' case.

To provide Mr. Hicks a full and fair trial, the defense submits the proffered expert witness evidence must be admitted. Further, the proffered experts should be allowed to testify live before the commission to facilitate the most effective presentation of the evidence, and to allow the commission the opportunity to question the witnesses.

The prosecutions arguments that expert legal testimony would not be helpful to the commission and would promote a "battle of the experts" are untenable. Only the prosecution would benefit by the absence of expert legal testimony on the defense motions in this case. To date, the prosecution has offered no basis for many of its positions other than the often used, but meaningless "under Commission Law," the vast majority of which was created by the executive branch in establishing the commission process and the "offenses" to be tried in it.

Both Mr. Hicks and the commission, which has the difficult responsibility of being both the finder of fact and law, deserve to have experts trained in International law, including the law of war, testify during the pre-trial motions phase of this commission trial.

4. **Evidence**: The testimony of expert witnesses.

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[19] IT-96-21-T of 16 November 1998

[20] Order available at www.un.org/icty/celebici/appeal/order-e/00214EV311633.htm

[21] The judges for the international criminal tribunals are required to have extensive experience and yet still accept expert witnesses. See judges qualifications for ICTY and ICTR.

[22] The ICTY is using Mr. Tim McCormack, one of the defense requested expert witnesses, as amicus curiae in the Molosevic case.

5. **Relief Requested**: For the above reasons, the defense requests that the commission deny the prosecution's motion to exclude the use of expert witness and permit expert witnesses, called by either side to this commission, to testify live before the panel at Guantanamo Bay.

6. The defense requests oral argument on this motion.

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